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In The

Supreme Court of the United States

October Term, 1997

Z.J. GIFTS D-2, L.L.C., d/b/a CHRISTIE'S, an Oklahoma Limited Partnership,

Petitioner,

vs.

CITY OF AURORA, an Incorporated Municipality,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

ARTHUR M. SCHWARTZ
Counsel of Record
MICHAEL W. GROSS
ARTHUR M. SCHWARTZ, P.C.
Attorneys for Petitioner
600 – 17th Street
Suite 2250S
Denver, Colorado 80202
(303) 893-2500

147025

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Tenth Circuit erred in holding that "differences in the mode of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining" the content neutrality of a sexually oriented business zoning regulation.

II. Whether the challenged sexually oriented business zoning regulations are narrowly tailored to advance the government interest of reducing adverse secondary effects of such businesses where the government presented no evidence relating to businesses such as Petitioner's that offer no on-premises consumption of sexually explicit materials.

III. Whether studies concerning secondary effects of adult businesses that offer on-premises consumption of sexually oriented materials are constitutionally relevant to support the enactment of a zoning ordinance restricting businesses that do not feature on-premises consumption of sexually-oriented material.

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APPENDIX

Appendix A — Opinion for the United States Court of Appeals for the Tenth Circuit Filed February 10, 1998 ..... 1a

Appendix B — Memorandum Opinion and Order on Cross Motions for Summary Judgment of the United States District Court for the District of Colorado Dated July 23, 1996 ..... 15a

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The Petitioner, Z.J. Gifts D-2, L.L.C., d/b/a Christie's, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered on February 10, 1998 and the subsequent denial of the Petition for Rehearing on March 31, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on February 10, 1998 and is reported as *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998). The opinion is reprinted in the Appendix hereto, pp. 1a-14a. The Court's order summarily denying the Petition for Rehearing is reproduced in the Appendix hereto, p. 27a.

The opinion of the United States District Court for the District of Colorado was entered on July 23, 1996 and is reprinted in the Appendix hereto, pp. 15a-24a. The opinion was reported as *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 932 F. Supp. 1256 (D. Colo. 1996). An order for entry of final judgment was entered on September 27, 1996 in the United States District Court for the District of Colorado and is reproduced in the Appendix hereto, pp. 25a-26a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit reversing the District Court's opinion and judgment was entered on February 10, 1998. A timely filed Petition for Rehearing was denied on March 31, 1998. Pursuant to Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States, this Petition for Writ of Certiorari was timely filed within 90 days of that date.

The Tenth Circuit Court of Appeals' decision is a final judgment since it reversed the final judgment of the United States

District Court which held unconstitutional the Aurora sexually oriented business zoning regulations. Therefore, this Court has jurisdiction to review the opinion of the Tenth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment One

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

United States Constitution, Amendment Fourteen

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Provisions of the Aurora Municipal Code

> Relevant provisions of Aurora Municipal Code §§ 32.5-1, *et seq.*, are set forth verbatim in the Appendix hereto, pp. 28a-38a, *infra*.

STATEMENT OF THE CASE

Petitioner, Z.J. Gifts D-2, L.L.C., is an Oklahoma limited partnership authorized to transact business within the State of Colorado. Petitioner, doing business under the tradename of Christie's, operates a lingerie and novelty business that also rents videotapes. All videotapes are viewed off premises. Some of the

materials sold or exhibited at this business are sexually explicit in nature and are presumptively protected speech materials guaranteed by the First and Fourteenth Amendments to the United States Constitution. These materials are sold and exhibited to consenting adults only.

Respondent, City of Aurora, is an incorporated home rule municipality within the State of Colorado which has the authority to enact ordinances.

Petitioner entered into a lease with the owner of a parcel of property commonly described as 15451 E. Mississippi Avenue, Suite B, Aurora, Colorado in the Granada Park Shopping Center. Such lease was for the purpose of opening a retail business on the premises offering lingerie, novelties, publications and videotapes for sale to the public. Prior to entering into the lease, and prior to improving the premises, Petitioner, through its agent, determined that the premises complied with all existing Aurora zoning requirements for retail businesses and no Aurora ordinances specifically regulated "adult uses" through zoning. Inspections for compliance with health, safety, fire and electrical codes were made on-site and the premises were approved as being in compliance with city code regulations. The location at 15451 E. Mississippi Avenue, Suite B is in a B-2 commercial retail zoned district, which pursuant to the Aurora Municipal Code, permits the operation of a retail business.

On or about November 19, 1993, the City of Aurora issued a business license to Petitioner. On or about December 13, 1993, the city council of the Respondent City of Aurora enacted into law Chapter 32.5 ["the Ordinance"] which imposes licensing and zoning requirements on "sexually oriented businesses". The Respondent City, by and through its agents, including members of the Aurora City Council, openly avowed, by statements made and attributed to them, that the Ordinance was enacted for the express purpose of

closing Petitioner's business and that the Ordinance would be strictly enforced against Petitioner.

Petitioner filed suit in the United States District Court invoking federal jurisdiction under 42 U.S.C. § 1983 alleging, *inter alia*, that Chapter 32.5 was unconstitutional on its face and violative of Petitioner's protected rights of speech and expression in that the locational restrictions were content based restrictions that were not narrowly tailored to advance any substantial government interest. Petitioner sought declaratory relief that the Ordinance was unconstitutional, as well as injunctive relief against enforcement of the Ordinance.

The Respondent City of Aurora filed a counterclaim seeking to enjoin the operation of Petitioner's establishment. Thereafter, the parties filed cross-motions for summary judgment. After hearing oral arguments on March 28, 1996, the District Court entered an order on July 23, 1996 granting Petitioner's motion for summary judgment, in part. Appendix pp. 15a-24a.

The District Court determined that although the Ordinance was neutral as applied to businesses providing sexually explicit entertainment *on* the premises, the Aurora zoning regulations became content based as applied to businesses which offered sexually explicit expression for *off* premises consumption only. Appendix pp. 23a. Based upon this holding, the District Court determined that the Aurora zoning restrictions were unconstitutional as applied to Petitioner because the Ordinance was not narrowly tailored to advance the stated government purpose and far less restrictive alternatives existed to achieve the City's goals. All other claims by all parties were determined to be moot in light of the District Court's ruling on zoning restrictions.

On September 27, 1996, the District Court entered a final judgment which disposed of all claims as to all parties. Respondent

City of Aurora filed a notice of appeal therefrom on October 11, 1996.

On February 10, 1998, the United States Court of Appeals for the Tenth Circuit reversed the District Court's opinion and judgment and held that the challenged Aurora adult zoning regulations were constitutional. In so holding, the Tenth Circuit determined that the distinction between businesses providing on-premises consumption of sexually explicit materials and businesses selling such material solely for use off premises was "constitutionally insignificant" in determining the content neutrality of the challenged Ordinance or the significance of the government's interest in enacting the regulations. Appendix, p. 7a. The Court determined that the challenged sexually oriented zoning regulations were content neutral because the record showed that zoning regulations were enacted to control the alleged harmful secondary effects of adult businesses.

The Tenth Circuit then determined that the zoning restrictions were narrowly tailored to address the secondary effects of "indisputably sexually oriented businesses." Appendix, p. 13a. The Court determined that this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), "grants the city broad discretion to choose the means and scope of its broad regulation of sexually oriented businesses." Appendix, p. 12a.

Petitioner timely filed a petition for rehearing on February 24, 1998 which was denied on March 31, 1998.

REASONS FOR GRANTING THE WRIT

I.

SEXUALLY EXPLICIT EXPRESSION THAT IS NOT OBSCENE IS ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Pursuant to Aurora Municipal Code § 32.5-2.1, a "sexually oriented business" (as that term is defined in A.M.C. § 32.5-2) must obtain a license in order to lawfully operate within Aurora, Colorado. Additionally, "sexually oriented businesses" are subject to strict operational and locational requirements pursuant to A.M.C. §§ 32.5-41 through 32.5-59 of the challenged Ordinance. In its counterclaim, the Respondent City asserted that Petitioner operates a sexually oriented business subject to regulation under the Ordinance.

Initially, it is crucial to bear in mind that the United States Supreme Court has consistently recognized the broad range of entertainment falls within the protection of the First Amendment to the United States Constitution. In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981), Justice White stated:

> Entertainment, as well as political and ideological speech is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. (Citations to 8 United States Supreme Court cases omitted).

Most recently in *United States v. X-Citement Video, Inc.*, 513 U.S. __, 130 L. Ed. 2d 372, 381 (1994), Chief Justice Rehnquist unequivocally wrote:

> [N]on-obscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment. *Alexander v. United States*, 509 U.S. __ (1993) (Slip. Op. at 4-5); *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224 (1990); *Smith v. California*, 361 U.S. at 152. (Footnote omitted).

As pointed out by Judge Kozinski in *United States v. United States District Court*, 858 F.2d 534, 541 (9th Cir. 1988),

> [T]he first amendment is as close to an absolute as we have in our jurisprudence: Speech shielded by the amendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message . . . cannot, of course, detain us from discharging our duty as guardians of the Constitution.

Based upon these unequivocal precedents, there is no question that the challenged Ordinance regulates constitutionally protected speech and, thus, must be evaluated under a stringent First Amendment analysis.

II.

THE CHALLENGED AURORA ORDINANCE IMPOSING ZONING REGULATIONS ON SEXUALLY ORIENTED BUSINESSES IS NOT NARROWLY TAILORED TO AFFECT ONLY THAT CATEGORY OF BUSINESS SHOWN TO CAUSE ADVERSE SECONDARY EFFECTS.

A. Adult Zoning Ordinances as Time, Place and Manner Restrictions on First Amendment Rights

> The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits."

Schad, 452 U.S. at 68. Where protected First Amendment rights are at stake, zoning regulations do not have a "talismanic immunity from constitutional challenge." *Young v. American Mini Theatres*, 427 U.S. 50, 75 (1976) (Powell, J. concurring). The later decision in *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) does not change these principles.

American Mini Theatres was the first case in which this Court considered a zoning scheme aimed (in part) at adult businesses as a separate classification. There, the Court upheld a Detroit zoning ordinance requiring adult movie theaters to disperse by not locating within 1000 feet of another such theater. A 500 foot distance requirement from residential areas was not considered by the court. Four justices found the zoning scheme permissible in the face of both the First Amendment and Equal Protection challenges. Justice Powell, in a concurring opinion, declined to join Part III of the

plurality opinion which found that non-obscene materials may be treated differently under First Amendment principles from other forms of protected expression. *American Mini Theatres*, 427 U.S. at 73, n.1 (four justices dissented).

Justice Stevens, writing for the plurality, based his opinion on the fact that the ordinance did not restrict in a significant way the number of locations within the city where adult businesses could locate:

> The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that the Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the city of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight. *Id.*, n.35.

Thus, given the fact that there was no serious restriction on access to adult materials as a result of the ordinance, the Court upheld the 1000 foot dispersion provision.

In his concurrence, Justice Powell wrote that a zoning scheme such as Detroit's, in order to survive constitutional scrutiny, must satisfy the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968): (1) whether the enactment is within the constitutional power of the government; (2) whether it furthers a substantial governmental interest; (3) whether that interest is unrelated to the suppression of free expression; and (4) whether the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. Convinced the Detroit plan met all parts of the test, Justice Powell joined the plurality in upholding the plan. However, he cautioned:

> . . . Although courts must be alert to the possibility of direct rather than incidental effects of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression, it is clear that this is not such a case. *Id.*, at 84.

In the wake of *American Mini Theatres*, local governments around the country experimented with zoning as a way to regulate (and in many cases, eliminate or ban) adult businesses. In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, this Court struck down a zoning scheme that prohibited all live entertainment within a town. The ordinance did not prohibit preexisting live entertainment that qualified as non-conforming uses. *Id.*, at 64, n.3. The Court noted that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Id.* Under this analysis, the Court held the ordinance was neither justified by any substantial government interest, nor narrowly drawn to address any problems that might be created by live entertainment. Finally, the ordinance could not be upheld under a time, place and manner analysis.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, this Court upheld an ordinance prohibiting adult motion picture theaters from locating within 1000 feet of any residential zone, church, park or school. Renton had provided an area of 520 acres for adult businesses. Under the ordinance, adult theaters were concentrated within that area rather than dispersed. *See Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1337 (9th Cir. 1987). As noted in Renton's Jurisdictional Statement, p. 18, and discussed in oral argument before the Supreme Court, transcript of argument at 5-6, there was space for *over 400* adult theatres in the small (15.3 square mile) community of 32,200 (in 1981). *See Woodall v. City of El Paso*, 950 F.2d 255, 259 (5th Cir. 1992), *mod.*, 959 F.2d 1305 (5th Cir. 1992). As a result, the Renton ordinance was upheld:

> *Renton* has not used "the power to zone as a pretext for suppressing expression," *American Mini Theatres* at 84 (Powell, J., concurring), but rather has sought to make some areas available for adult theatres and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theatres from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres*, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment. *Renton,* 475 U.S. at 54-55.

In the analysis of *Renton*'s ordinance, then-Justice Rehnquist initially noted that the ordinance was content-neutral:

> [A]s the District court concluded, the *Renton* ordinance is not aimed at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. [Emphasis in original] *Id.*, at 47.

Applying the time, place and manner regulation approach discussed in both the plurality and concurring opinions in *American Mini Theaters*, the Court determined the inquiry was "whether the *Renton* ordinance is designed to serve a substantial government interest and allows for reasonable alternative avenues for communication." *Id.* at 50. Under the first prong of this analysis, the Court noted that

> the *Renton* Ordinance is "*narrowly tailored*" *to affect only the category of theaters shown to produce the unwanted secondary effects*, thus avoiding the flaw that proved fatal in *Schad v. Borough of Mount Ephraim*, [*supra*] . . . .

Id. at 52 (emphasis added). Based upon this statement the *Renton* Court did "not . . . intend [ ] to eliminate the narrow tailoring requirement from time, place and manner analysis." *International Eateries of America v. Broward County*, 941 F.2d 1157, 1162 (11th Cir. 1991). With regard to the second portion of the test, referring to reasonable alternative avenues of communication, the Court stated that "the First Amendment requires only that *Renton* refrain from effectively denying respondents a *reasonable opportunity to open and operate an adult theater* within the city." *Renton,* 475 U.S. at 54.

B. The Challenged Aurora Regulations Are Not Narrowly Tailored To Advance Any Government Interest as Applied to Petitioner's Business

In order to be a valid time, place or manner regulation, the Aurora sexually oriented business zoning restrictions must be narrowly tailored to advance the City's stated interests in stopping crime. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474 (1988). While the ordinance need not be the least restrictive means of regulation,

> this standard does not mean that a time, place or manner regulation may burden substantially more speech than necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Ward v. Rock Against Racism, 491 U.S. 781 (1989). *See Schenk v. Pro Choice Network of Western New York*, 519 U.S. __, 137 L. Ed. 2d 1, 117 S. Ct. __ (1997) [floating buffer zones at abortion clinics burden more speech than necessary to serve the government interest].

The Respondent City asserts that the challenged Ordinance applies to Petitioner's business despite the fact that Petitioner does not present any live nude entertainment or show any films on the premises. Petitioner operates a retail establishment that allows persons to purchase or rent protected expression in the form of videos or publications and view this material off the premises. The evidence considered by the Respondent City before enacting the challenged Ordinance did not involve this type of retail business, rather focused exclusively on establishments providing on-premises viewing of live nude entertainment, films in theaters or peepshow booths.

Several courts have held that this distinction is crucial in determining whether a regulation of adult bookstores could be constitutionally applied to a particular retail establishment. In *Worldwide Video v. City of Tukwila*, 117 Wash. 2d 382, 816 P.2d 18, 21 (Wash. 1991), *cert. denied*, 503 U.S. 986 (1992), the Washington Supreme Court struck down an adult zoning ordinance as it was applied to a retail store renting sexually explicit videos for off-premises viewing:

> In contrast [to *Renton*], *Tukwila* has not shown that adult businesses with predominantly "take-home" merchandise (which clearly are covered by the ordinance) have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows; thus the "substantial governmental interest" portion of the test has not been met.

The Court rejected the municipality's argument that it should be permitted to rely upon studies of adult businesses in other cities:

> The Supreme Court held a city could rely on evidence generated by others, "so long as whatever evidence the city relies upon is reasonably believed to be relevant

> to the problem that the city addresses." *Renton*, 475 U.S. at 51-52, 106 S.Ct. at 930-931. The *Tukwila* ordinance does not pass this test; it strives to regulate forms of expressive activity different form those studied in the materials upon which it relies. Because *Tukwila* has shown no substantial governmental interest that is served by regulating the numerous types of businesses covered by the Ordinance 1465, the ordinance is unconstitutional under the United States Constitution. *Id.*

Similarly in *Richardson v. Wile*, 535 A.2d 1346, 1350 (Del. 1988), the Delaware Supreme Court construed a Delaware statute to not include video rental stores that did not provide on-site viewing of films:

> In contrast, video rental stores generally offer videos for home use and do not include the on-site element that Chapter 16 seems to contemplate. We find the site/activity nexus a significant indication, in itself, of legislative intent and clearly at variance with the Town's claim of unambiguous meaning. . . . [T]he expansive definition of adult entertainment establishments in section 1602 must be read in accordance with the more narrow stated purpose, the reduction in the promotion of criminal obscenity and prostitution, in section 1601. This difference becomes significant when viewed in relation to the cited examples of "adult entertainment establishments" in section 1602. As noted, these examples encompass *on site* activities which would be likely to promote the crimes of obscenity and prostitution. In contrast, a *video rental store which rents movies for home use does not generate the same concerns.* (Emphasis added).

See also MD II Entertainment v. City of Dallas, 28 F.3d 492 (5th Cir. 1994) (Ordinance invalid where City failed to present evidence of correlation between advertising and adverse secondary effects); *MD II Entertainment v. City of Dallas*, 935 F. Supp 1395, *aff'd*, (5th Cir. Case no. 95-10322, 4/30/96 summary calendar); *Faraone v. City of East Providence*, 935 F. Supp. 82, 88-89 (D.R.I. 1996); *Discotheque Inc. v. Augusta, Georgia*, 264 Ga. 623, 449 S.E. 2d 608 (1994) (City failed to establish pernicious secondary effects of adult entertainment based upon record); *Quetgles v. City of Columbus*, 450 S.E. 2d 677 (Ga. 1994).

The District Court in the instant case specifically determined that the analysis in Eighth Circuit decision in *ILQ Investments Inc. v. City of Rochester*, 75 F.3d 1413 (8th Cir. 1994) is "flawed in that it is directed more toward the subjective intent of the city council then the objective effects on the freedom to communicate." Appendix, p. 18a. The Tenth Circuit, however, adopted the reasoning of *ILQ* in finding that the zoning regulation was content neutral.

Unlike *ILQ*, Petitioner does not argue that the Respondent City is "constitutionally required to disregard" studies concerning adverse secondary effects. Pursuant to the subsequent United States Supreme Court decisions in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994) and *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. __, 135 L. Ed. 2d 888, 116 S. Ct. 2374 (1996), the judiciary does, however, have "an obligation" to review the legislative record and in the absence of a factual basis substantiating the harm and the efficacy of the proposed solution, strike down the regulation that infringes on First Amendment rights. Moreover, as discussed, *infra*, substantial evidence in the legislative record actually reveals that Petitioner's business does *not* cause the adverse secondary effects sought to be remedied by the City.

In the instant case, the Respondent City of Aurora relied upon studies from fourteen (14) different cities, none of which dealt

with any business that did not provide on-premises entertainment in the form of live nude entertainment or the exhibition of films in theaters and arcades. In addition, the materials placed in the legislative record dealt exclusively with peep shows, theaters and live entertainment presented on-site by the adult business. [R., App. V. I, pp. 172, 182-183, 196-199, 210-211]. *See* summary of studies. [R., App. V. 2, pp. 345-346]. None of the studies presented to the city council of the Respondent City supported a conclusion that the studies specifically considered the secondary effects produced by a business such as Petitioner's which does not provide on-premises entertainment and sells sexually explicit material as a portion of a retail mix that involves non-sexually explicit materials.

Indeed, the only evidence provided to the city council before enactment of the Ordinance that was relevant to the Petitioner's operation was presented by Aurora Deputy Chief of Police Michael Stiers. The Aurora Police Department researched studies concerning the adverse secondary effects and determined that establishments such as Petitioner's caused the least impact on crime statistics of any class of so-called adult businesses. In fact, five of Petitioner's locations in Oklahoma City did not produce "a single complaint." The relevant text of Deputy Chief Stiers statement is as follows:

> As a follow up to Counselor Arrington's comments, the Police Department has taken upon the role of trying to research some of the studies that have been done across the nation on this type of activity. And, I'm here tonight to speak to what he terms as the adverse secondary effects, that being a higher crime rate. And we too have discovered that, as the studies indicate, that most of the secondary effects that take place in the higher crime rates are determined by the level of activity that occurs at the location. As an example, the most frequent crime, or the higher crime rate was most

frequent at, as Mr. Arrington indicated, at the locations that incorporate the peep show type of activities. Next, there were the nude dancing organizations, whether they be a full-blown nightclub, or the local ones with the peep shows. Movie theaters, those bring in an additional amount of criminal activity. And *I'm going in descending order now. The, and then the last group we looked at were the groups where there was an individual book store, video rentals, or the novelty type stores that we may be concerned with here tonight.* If there is any combination of those different groups, then it just enhanced the criminal activity around those locations. To the other, to get along with what Councilman Gaston was asking, the other thing we did was a bit of research on Christie's, not here in the City of Aurora, but the ones we are familiar with Oklahoma City and the City of Denver. And we were able to talk to those vice and narcotic units as late as 4:00 o'clock this afternoon, and we received some information back on those types of locations as compared to the other types of locations that are located in those cities. I'll be happy to answer questions.

Mayor Tauer:

Questions of Chief Stiers? Council Member Cleland.

Council Member Barbara Cleland:

What kind of information did you get from Oklahoma City?

Deputy Chief Stiers:

Oh, I'm sorry, I should have [unintelligible]. Actually, in talking to Oklahoma City, the information

> that they gave us was that the first Christie's opened there in 1989. They now have five of those locations within their city. *And as of today, their vice and narcotics units have not had a single complaint at those locations.* Also, in talking to the City of Denver, their's opened earlier this year and *they too have not had any increase of criminal activity at that location on South Colorado Boulevard.* Although, Oklahoma City indicated that in some of their areas, they have a hard time discerning because of the proximity of some of those stores close to some of these other activities, such as the peep show activities and movie theaters, as to what is really generated by what. But at this specific location, they had zero at this time.

See Transcript, Aurora City Council, pp.13-15, 11/22/93 (emphasis added) [R., App. Vol. I, pp. 231-233].

Thus, the only evidence before the city council showed that Petitioner's establishment did not cause any increase in the crime rate or deterioration of the neighborhood. None of the studies from the 14 cities provide a basis for determining that the Aurora City Council reasonably could have believed that the conclusions reached in these studies were relevant to the problems which may or may not be caused by businesses of a type similar to Petitioner's. Moreover, although each of the studies concluded that there were secondary effects produced by "sexually oriented" businesses, none of these studies discussed, much less considered, that any business selling a smaller amount of sexually explicit material produced secondary effects similar to those produced by businesses engaging exclusively or primarily in the sale of such material. Neither do these studies support any reasonable inference that because a bookstore purveying only sexually explicit material and allowing on-premises consumption produced unwanted secondary effects, a retail establishment featuring both sexually explicit and non-

sexually explicit material, and requiring off-premises consumption produces the same effects.

Clearly, the studies presented to the Aurora City Council cannot "reasonably [be] believed to be relevant to the problem the City addresses." *Renton*, 475 U.S. at 51-52. Moreover, these studies make clear that the challenged Aurora Ordinance is *not* "that category of [business] shown by the factual evidence to produce unwanted secondary effects" as required by *Renton*, 475 U.S. at 51-52. For these reasons, the application of the Aurora Ordinance to Petitioner's business is violative of the First Amendment, and the petition for certiorari should be granted.

III.

THE TENTH CIRCUIT HAD AN OBLIGATION TO SCRUTINIZE THE RECORD TO DETERMINE WHETHER THE CITY MET ITS BURDEN OF SHOWING THE ALLEGED HARMS WERE REAL AND THAT THE CHALLENGED REGULATIONS WERE NARROWLY TAILORED TO ADVANCE ITS INTERESTS.

This Court has on numerous occasions imposed on the judiciary "an *obligation* to exercise independent judgment when First Amendment rights are implicated" by government restrictions on speech. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 129 L. Ed. 2d 497, 532 (1994) In *Turner*, the Court made clear that the government carried the burden of showing there was an actual harm addressed by a restriction on First Amendment rights and that harm was significantly remedied by the restriction:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence

> of the disease sought to be cured." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (CADC 1985). *It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. See Edenfield v. Fane*, 507 U.S. 761, 770-771, 123 L. Ed 2d 543, 113 S. Ct. 1792 (1993); *Los Angeles v. Preferred Communications, Inc.*, 476 US, at 496, 90 L. Ed 2d 480, 106 S. Ct. 2034 ("This Court may not simply assume that the ordinance will always advance the asserted state interest sufficiently to justify its abridgment of expressive activity") (internal quotation marks omitted); *Home Box Office, Inc. v. FCC*, 567 F. 2d 9, 36 (CADC 1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem that may be highly capricious if that problem does not exist' ") (citation omitted).
>
> Thus, in applying *O'Brien* scrutiny we *must ask first whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry*. Assuming an affirmative answer to the foregoing question, the *Government still bears the burden of showing that the remedy it has adopted does not "burden substantially more speech than is necessary to further the government's legitimate interests*." *Ward*, 491 US, at 799, 105 L. Ed 2d 661, 109 S. Ct. 2746. On the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied either inquiry.

Turner, 129 L. Ed. 2d at 531-532 (emphasis added). Likewise in the recent *Denver Telecommunications* case, this Court engaged in

a detailed analysis of the record provided to support restrictions on cable television broadcasts protected by the First Amendment. The Court struck down two of three challenged regulations on the basis that the legislative record was inadequate to justify the restrictions on protected expression. "In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume the harm exists or that the regulation addresses it." *Id.*, citing *Turner*, 135 L. Ed. 2d at 917. The Court unequivocally refused to engage in guesswork to justify restrictions on protected speech.

> In other cases, where, as here, the record before Congress or before an agency provides no convincing explanation, this Court has not been willing to stretch the limits of the plausible, to create hypothetical non obvious explanations in order to justify laws that impose significant restrictions upon speech. See, *e.g.*, *Sable* [*Communications v. FCC*, 492 U.S. 115], at 30, 106 L.Ed.2d 93, 109 S.Ct. 2829 (1989), 106 L. Ed 2d 93, 109 S. Ct. 2829 ("[T]he congressional record presented to us contains no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be"); *Simon & Schuster*, 502 US, at 120, 116 L. Ed 2d 476, 112 S. Ct. 501; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 US 575, 585-586, 75 L. Ed 2d 295, 103 S. Ct. 1365 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 US 221, 231-232, 95 L. Ed 2d 209, 107 S. Ct. 1722 (1987).
>
> Consequently, we cannot find that the "segregate and block" restrictions on speech are a narrowly, or reasonably, tailored effort to protect children. Rather, they are overly restrictive, "sacrific[ing]" important First Amendment interests for too "speculative a gain."

> *Columbia Broadcasting*, 412 U.S. [94], at 127, 36 L. Ed 2d 772, 93 S. Ct. 2080; see [*FCC v.*] *League of Women Voters* [*at California*], 468 U.S. [364], at 397, 82 L. Ed 2d 278, 104 S. Ct. 3106 [1984]. For that reason they are not consistent with the First Amendment.

Id. 135 L. Ed. 2d at 913.

In the instant case, the evidence advanced by the Respondent City wholly fails to show that businesses such as Petitioner's that do not provide any on-premises viewing of sexually explicit films cause the alleged adverse secondary effects associated with peep shows and topless cabarets. On appeal, Respondent asserted that all adverse effects of sexually oriented businesses are caused "by their very nature." Appellant's Opening Brief to the Tenth Circuit, p. 19. The Respondent City repeatedly noted that there is "no evidence in the record indicating, one way or another whether [adult bookstores] allowed on-site consumption of sexually explicit material." *Id.*, p. 22. Thus, the City took issue with the District Court's refusal "to assume the harm exists or that the regulation addresses it" as required by *Denver Telecommunications Consortium*, 135 L. Ed. 2d at 917.

Moreover, a careful examination of the record reveals that the evidence indicates businesses such as Petitioner's that do not provide on-premises viewing of sexually explicit entertainment do not create the adverse secondary effects associated with businesses that provide viewing of live entertainment or films on premises. There is evidence in the record that the "adult bookstores" do, in fact, almost universally provide on-premises viewing in peep show booths. The "Report on Proposal to Regulate Sexually Oriented Business" (the "Report") [R., App. V. I, pp. 149-156] submitted to the City by Barry Arrington sets forth three (3) specific "reasons for proposed ordinance", namely: (a) crime; (b) property values; and (c) public health risks. These three specific adverse secondary effects were reinforced in Mr. Arrington's statement before the

Aurora City Council on November 22, 1993. [R., App. V. I, pp. 221-222].

A. Crime

The City relied upon studies from several cities that sexually oriented businesses caused increased crime. The City admits in its Opening Brief to the Tenth Circuit, p. 27, there is no evidence in the record concerning whether any of the crime studies dealt with businesses that did not provide on-premises viewing. The Report focuses on situations in Oklahoma City, Denver and Adams County, Colorado. As noted by the District Court in its decision, the evidence provided by the City indicated that businesses such as Petitioner's that did not provide on-premises viewing of sexually explicit entertainment did not cause increased crime:

> The problem here is that none of the material relied on by the city council shows that the business of Christie's bears any relationship to such effects.
>
> Indeed, in the matter of any increase in crime, the evidence is distinctly to the contrary. Deputy Police Chief Michael Stiers told the city council that Christie's had business establishments in Oklahoma City and that there were no reports of crime from them. He also said that there was such a business in Denver, and there were no reports of crime from it. Exhibit D, pp. 13-15, Petitioner's Brief in Support of Cross-Motion for Summary Judgment. [App. V.2, pp. 347-350]

The Report also referred to studies conducted by the Adams County Colorado Sheriff's Department [R., App. V. I, pp. 182-185] which found a connection between sexually oriented businesses and crime. This study looked at 28 different sexually oriented business locations in unincorporated Adams County which

> hosted six (6) adult bookstores (all but one offering live nude entertainment), one (1) all nude "pop shoppe", seven (7) massage parlors, eight (8) topless nightclubs (with liquor licenses), and some six (6) nude "rap", lingerie, modeling type studios.

[R., App. V. 1, p. 183] There was no indication whether the adult bookstores presented on-premises viewing of sexually explicit films. As such, the Adams County study has no bearing on the regulation of Petitioner's business.

The Report also refers to a statement of Denver Vice Sergeant Rick McNellis and a supporting memo. [R., App. V. I, pp. 196-200]. Sergeant McNellis' statement quoted the Meese Commission report in describing peep show booths and the activities that occur at such locations. [App. V. I, pp. 196-198] A memo entitled "An Evening with Denver Vice" describes activities at an "adult bookstore" and an "adult theatre." The description of the "adult bookstore" focused exclusively on the peep booths at that "bookstore." The memo states "Vice Sergeant McNellis stated that *peep show booths located at most adult bookstores are a particular problem.*" [R., App. V. I, p. 199] Thus, while the City asserts that Petitioner's business is subject to regulation as an "adult bookstore" it lacks the salient feature, namely, peep show booths, that cause the specific adverse secondary effects the City ostensibly seeks to suppress.

Thus, as found by the District Court, the evidence before the Court indicates that a business like Petitioner's is considerably different from businesses that present on-premises viewing of sexually explicit material either in the form of live entertainment or films. While the studies relied upon by the Respondent City showed that latter classes of business may well be connected to criminal activity, the *only* relevant evidence considered by the City indicates Petitioner's business and similar establishments do *not* cause an increase in crime.

B. Property Values

The second adverse secondary effect identified in the Report is the adverse effect of sexually oriented businesses on property values. The Report relied upon a "voter survey" of Denver residents who believed that "sexually oriented businesses" would have a negative impact on property values. The "voter survey" contained in the record includes no indications of who conducted the poll or the methodology employed. [R., App. V. I, pp. 210-211]

The Report went on to cite a survey of nineteen (19) real estate appraisers in the Denver area.[1] The Report focused on the response to the question of how the location of "an adult bookstore" would impact property values. There is no definition provided for what constitutes "an adult bookstore." [R., App. V. I, pp. 212-215] While the majority stated that property values would suffer for both residential and commercial properties if "an adult bookstore" located within one block of the property, a majority also indicated there would be no change in property values if the adult bookstore was located within three (3) blocks of the property. [R., App. V. I, p. 212] It is notable the survey results omitted any spaces to reflect any type of positive results. *Id.*

The final question of the survey concerned the impact of the undefined "adult bookstore" on property values with other types of uses. The results of this question were quite confusing due to the nature of the question, but apparently revealed that a majority of those who responded believed that a drug rehabilitation clinic, massage parlor, topless bar, adult theatre, or adult video arcade would cause a reduction in property values.

Finally, the Report cited a statement by Kirk E. Douglas, a real estate consultant, that indicates that land acquisitions in Adams

1. The 19 responses reflected a response rate of 8.5% [App. V. I, p. 101].

County cost less than expected due to proximity to sexually oriented businesses. [R., App. V. I, pp. 175-181] However, as specifically noted in the crime study conducted by the Adams County Sheriff's Department, at least 27 of 28 adult uses (96.4%) in unincorporated Adams County unquestionably had on-premises viewing of live nude entertainment. [R., App. V. I, pp. 183-185] Thus, Mr. Douglas' report wholly failed to address businesses such as Petitioner's where there was no on-premises viewing.

The District Court specifically noted these deficiencies in stating:

> The studies concerning real estate values are non-persuasive. They seem to be little more than opinions of real estate appraisers based on hypotheticals, and there does not seem to be any distinction made between the type of adult book stores with peep show facilities and those that are engaged solely in the sale or lease of sexually oriented materials for use elsewhere. *Z.J. Gifts,* 932 F. Supp 1256, at 1258-9. Appendix, p. 19a.

Respondent's assertions regarding a decline in property values completely failed to address the impact of a business like Petitioner's. There is a total lack of empirical support to justify the Respondent City's broad limitation on Petitioner's protected rights.

C. Public Health Risks

The third major adverse effect of sexually oriented businesses set forth in the report is risk of transmission of sexually transmitted diseases through high risk anonymous sexual activity that is associated with peep show booths. [R., App. V. I, p. 151] The Report expressly referred to the affidavit of Vice Sergeant McNellis that "describes the peep booths located in most adult bookstores." [R., App. V. I, p. 151] Thus, the City's own report acknowledges

that peep booths are an essential component of what constitutes an adult bookstore that causes adverse secondary effects.

It is undisputed that Petitioner's business does not have any peep show booths or any viewing of sexually explicit films or entertainment on the premises. All of the materials are sold or rented for use off-premises. As such, the well documented concerns respecting peep show booths are non-existent when applied to Petitioner.

As seen, the three (3) foregoing specific adverse secondary effects asserted to be caused by sexually oriented businesses are not connected to a business such as Petitioner's. The crime data indicates that Petitioner's business does *not* cause additional crimes in its vicinity. The surveys concerning property values are purely hypothetical and are not supported by any relevant empirical data. Finally, the concerns relating to public health are completely tied to peep show booths which are not applicable in this instance. Moreover, as repeatedly admitted by the Respondent City, there is no data in the record that reveals whether or not any of the studies dealt with businesses such as Petitioner's that do not have on-premises viewing of sexually explicit materials. The only evidence in the record indicates that the vast majority of "adult bookstores" do, in fact, have peep show booths on-premises and these booths are directly linked to the adverse secondary effects the Respondent City seek to remedy.

As noted by the District Court,

> the problems well-documented in studies of adult businesses providing sexual entertainment can no more be generalized to a business like Christie's than they can to the cable television industry.

Appendix, p. 24a. As in *Denver Telecommunications*, 135 L. Ed. 2d 917 "[i]n the absence of a factual basis substantiating the harm

and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation addresses it." Based upon this recent statement by this Court, the petition for certiorari should be granted.

CONCLUSION

Rule 10 of the Supreme Court Rules states that review on a writ of certiorari will be granted only when compelling reasons exist to do so. Subsection (a) provides that one significant reason to grant a writ exists when a United States Court of Appeals has decided an important federal question in a way that conflicts with a decision of a state court of last resort. The opinion of the Tenth Circuit in the instant case is in direct conflict with the Washington Supreme Court's decision in *Worldwide Video v. City of Tukwila*, 117 Wash. 2d 382 (Wash. 1991), *cert. denied*, 503 U.S. 986 (1992). In addition, the Tenth Circuit's decision in the instant case determined the issues raised in this petition in a manner that is in conflict with the decisions of this Court cited in this petition.

Therefore, since important reasons exist for this Court to review the Tenth Circuit's decision in this case, Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

ARTHUR M. SCHWARTZ
Counsel of Record
MICHAEL W. GROSS
ARTHUR M. SCHWARTZ, P.C.
Attorneys for Petitioner
600 – 17th Street
Suite 2250S
Denver, Colorado 80202
(303) 893-2500